IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent/Cross Appellant, v. MICHAEL JAMES HIBBERD, Appellant/Cross Respondent.	No. 32399-1-II UNPUBLISHED OPINION

Van Deren, J. – Michael Hibberd appeals[1] his conviction of two counts of third degree child molestation. He argues that (1) prosecutorial misconduct deprived him of a fair trial; (2) the trial court improperly admitted e-mail messages; and (3) the instructions relieved the State of its burden to prove all the elements of the charged crimes.[2] We reverse and remand for a new trial

---

[1] The State cross appealed the sentence after objecting to the court's characterization of the two convictions as same criminal conduct. But in its brief, the State fails to assign error, list any issue, cite any authority, or make any argument related to its cross appeal. *See* RAP 10.1(f), 10.3(b). The State appears to have abandoned its cross appeal.

[2] At oral argument, because of the harmless error analysis adopted in *State v Zimmerman*, Hibberd also asserted that he received ineffective assistance of counsel when his counsel invited instructional error. 130 Wn. App. 170, 175, 121 P.3d 1216 (2005). We do not address this

due to prejudicial prosecutorial misconduct.

I. Facts

The State charged Hibberd with two counts of third degree child molestation of M.C., a 14 year old girl.

At trial, M.C. testified that she lived next door to Hibberd's family for five months and often spent time with his two children and his wife. On January 18, 2004, she knew that the Hibberd family had been visiting California when she received an e-mail message from Hibberd that read "we are back." Report of Proceedings (RP) at 32. M.C. testified that she had not previously received e-mail from Hibberd.

Believing that the whole family had returned, M.C. and her two younger sisters went to Hibberd's house, where Hibberd told them that the others had gone grocery shopping. M.C. watched her sisters play a video game and Hibberd asked her to come to the dining room to help him with "pop-ups" on his computer. RP at 35. M.C. testified that Hibberd put his hand under her shirt, rubbed her back, and then moved his hand lower (still underneath her clothing) to just below her "butt crack" while she was showing Hibberd how to close the "pop-ups."[3] RP at 41.

---

argument because it was not briefed by either party. *See State v. Johnson*, 119 Wn.2d 167, 170-71, 829 P.2d 1082 (1992). And because we remand for a new trial, it is not necessary to afford Hibberd further relief on this issue.

[3] M.C. provided testimony that her shirt was long, but did not testify about how high the top of

She stood up, backed away, and returned to the living room, where she again watched her sisters play the video game. She did not say anything about the touching and did not leave Hibberd's house.

After one of her sisters left, Hibberd asked her to help him access his e-mail account. While she was showing him how to use "Hotmail," he began rubbing her back under her shirt, and then began rubbing and gripping just below her right breast along the bottom of her bra. RP at 44. During this rubbing, M.C.'s other sister abruptly left because she was late for an appointment. As M.C. began to follow her, Hibberd "captured" her by wrapping his arms around her. RP at 49. Just then, the first sister returned and Hibberd immediately backed away.

M.C.'s sister began playing video games again; M.C. left the house, claiming she "would be right back," and went home, leaving her sister. RP at 52. She testified that she was so focused on getting out that she didn't think about taking her sister with her. She told her father

---

her pants reached on her hips or waist.

what had happened and he told her to retrieve her sister, which she did. M.C. testified that she took an extra long shower that night because she wanted to "wash it all off." RP at 57.

During the following week, M.C. received three additional e-mails from Hibberd: the first thanked her for coming over and asked for additional computer help, the second discussed the Superbowl and asked for computer help, and the record does not reflect the content of the third, although it was admitted as exhibit one. Hibberd unsuccessfully objected to the e-mail thanking M.C., on hearsay grounds, and to admission of exhibit one on hearsay and foundation grounds. Neither sister testified.

M.C.'s father admitted that although he had some short-term and long-term memory deficits, he clearly remembered M.C.'s demeanor and statements on January 18, 2004. He testified that when she returned from Hibberd's house she was crying, rubbing her hands all over herself, and stammering. He had never seen her in such a state before. She told him that Hibberd had touched her and because of her hand motions, he assumed the touching was sexual.

Cowlitz County Deputy Sheriff Laura Thurman interviewed both M.C. and Hibberd. She described M.C. as shy and embarrassed but she did not testify about what M.C. reported to her. On January 26, 2004, she interviewed Hibberd at his house. He showed her the computer area and told her that M.C. had been teaching him how to "instant message." RP at 108-09.

Hibberd's wife checked their computer for messages to M.C. and, although she found no messages, she found M.C.'s e-mail address in Hibberd's computer "address book." RP at 113.

Hibberd testified that on January 18, his wife and children were still in California. The three girls asked to come over; he let them in but he did not tell them anything about where his family was. He said that they played video games and then M.C. asked what he was doing at the computer. He asked her for help because he knew little about computers. She showed him e-mail and "Hotmail stuff" that he had no knowledge of, while the other two girls played video games and sometimes asked him questions about the games.

Hibberd asserted that he was never completely alone with M.C. He denied touching M.C., except for patting her twice on the upper back and thanking her when she was done showing him how to use the computer. He said that she helped him on the computer, returned to the living room to watch her sisters play, and then came back to help him on his computer again. She "showed [him] more of how to do that stuff." RP at 123. M.C. then told him that she was going home to check-in but would be back. Hibberd explained that M.C. put her e-mail address in his computer while she helped him and that he later sent M.C. "a couple" of e-mails, including one that said "How are you?" RP at 129. He denied touching her lower back, her buttocks, her breast, touching her under her clothing, or trying to hug her.

When the State questioned Hibberd about what typically happened when "the girls" came to his house to play video games on his PlayStation®, the following exchange occurred:

> [STATE]: You were supervising the games? So you were supervising the children? *Why are you looking at your lawyer?*
>
> [HIBBERD]: No, I made certain -- I made sure that --

RP at 131 (emphasis added). At this point, Hibberd's lawyer objected: "I have an objection to counsel's questions. I have an objection to the form of the question and the inference that it raises." RP at 132. The court overruled the objection.

The record contains only a brief discussion of jury instructions; it is apparent that the parties engaged in more extensive discussions off the record. Although the State originally proposed standard "to convict" instructions, after some off-the-record discussions or negotiations, it proposed instructions that incorporated specific alleged facts of touching into the element of sexual contact. Hibberd's attorney affirmatively endorsed the revised instructions, indicating that they resolved an earlier instructional dispute between the parties. The trial court instructed the jury using the "to convict" instructions endorsed by both parties.

During closing argument, the State turned almost immediately to a discussion of Hibberd's legal representation:

> [S]omething else that you know from life experience is that if a person has got a chance to think about what's going on in their life -- I'm facing going to jail, I'm

> facing being convicted of two counts of child molestation, they're going to gauge their answers, *they're going to have a person like [defense lawyer] helping them get their story out in a calm and collected manner, but you put a little pressure on that person and they're going to get flustered, and when they get flustered, the truth comes out.*
>
> He told you, I figured out how to do e-mail and I sent an e-mail to [M.C.] that said, "we are home." And you know what? *When he realized that he had said that, he looked at his lawyer.*

RP at 149-50 (emphasis added). Hibberd objected and the following exchange occurred:

> [DEFENSE]: Your Honor, I'm going to object as this being improper, and I would ask to be heard.
>
> THE COURT: The objection is overruled.
>
> [DEFENSE]: I would ask the Court to disregard [prosecutor's] statement about the fact that Mr. Hibberd has an attorney helping him and ask that that stricken as part of the argument.
>
> THE COURT: That objection is overruled.
>
> Ladies and gentlemen, part of the instructions, and I will reiterate them again, instruct you that you are to disregard any remark or statement by counsel that is not supported by the evidence or the Court's instructions. All right.

RP at 150.

The State then immediately repeated its argument. Having just been overruled, Hibberd did not repeat his objection.

The State also argued that M.C.'s actions were consistent with her claim that Hibberd had sexual contact with her, and that she was so upset by his fondling that she fled and left her sister

"with a child molester." RP at 154. Hibberd's unsuccessful objection was made two sentences later and was not clearly related to the reference to Hibberd as a "child molester." RP at 154.

Then, while reviewing the evidence and providing reasons why the jury should believe M.C.'s version of events, the State argued:

> She [M.C.] talks to the police. Any inconsistencies? Deputy Thurman was on the stand. She described how she was acting. But did defense counsel testify -- you know, get her to say, Well did she -- Wasn't this inconsistent with that?
>
> No inconsistencies in her story at all . . . .

RP at 158. Hibberd did not object to this first reference to the purported consistency between M.C.'s trial testimony and M.C.'s unadmitted statements to Thurman.

Hibberd's lawyer spent much of closing argument urging the jury not to penalize Hibberd for exercising his right to counsel and emphasizing that a party's legal representation was not a relevant factor in reaching a proper verdict. Hibberd's lawyer discussed the jobs of the various trial participants and praised the American criminal justice system, stating:

> [P]eople like Mr. Hibberd that are accused of a crime have the right to have someone speak for them, have the right to have a lawyer -- just as the State has the right to have a lawyer. It makes it fair. It's fairness, and that's what we have in our system is fairness.
>
> So the fact that Mr. Hibberd has a lawyer representing him should have no bearing on any decision you make. We each -- [prosecutor] is trained, I'm trained, we both have done many trials; that has no bearing on your decision. Your decision needs to be based on facts.

RP at 161-62.

Hibberd's lawyer referred to this theme and to the State's argument about Hibberd's having an attorney three more times during closing argument. Hibberd's lawyer also argued that the State asserted an impermissible inference of guilt from Hibberd's exercise of his constitutional right to representation.

In response to the State's argument that Hibberd had failed to show inconsistencies between M.C.'s unadmitted statements to Thurman and M.C.'s trial testimony, Hibberd's lawyer first pointed out that the jury's role was not to evaluate the attorneys' performance. She explained that the evidence rules require that the judge exclude some evidence and she encouraged the jury to instead evaluate only the admitted evidence. Hibberd's lawyer also argued strongly that the State failed to meet its burden of proof, failed to call M.C.'s sisters, and that M.C.'s actions were inconsistent with her claims about Hibberd's conduct.

The State began rebuttal as follows:

> If I intimated to you that [defense lawyer] didn't do her job, I apologize to you and to [defense lawyer].
>
> What I meant and what I hope you got for [sic] the argument is that *[M.C.] talked to the police, [M.C.] talked to you, and [M.C.] talked to [defense lawyer] here on the stand, and her story was consistent.*

RP at 170-71 (emphasis added). Hibberd objected to the State's argument regarding M.C.'s

statements to Thurman that were neither offered nor admitted, but the trial court overruled the objection.

The jury returned verdicts of guilty on both counts. The court found the two convictions to be same criminal conduct and imposed a standard range sentence of ten months. Hibberd appeals.

II. Analysis

A. Prosecutorial Misconduct

Hibberd argues that the prosecutor committed misconduct in three different ways. First, he claims it was misconduct to label him a child molester. Second, he claims that the prosecutor's remarks infringed on his constitutional right to counsel. Third, he claims it was misconduct to argue that M.C.'s unadmitted statements to the police were consistent with her trial testimony.

"Every prosecutor is a quasi-judicial officer of the court, charged with the duty of insuring that an accused receives a fair trial." *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). Judge Learned Hand observed that "[i]t is impossible to expect that a criminal trial shall be conducted without some show of feeling," but our courts have long and repeatedly emphasized that prosecutors must abstain from appeals to passion, prejudice, or sympathy, making rational and reasoned arguments from the evidence instead. *United States v. Wexler*, 79

F.2d 526, 529-530 (2nd Cir. 1935); *see State v. Reed*, 102 Wn.2d 140, 146-47, 684 P.2d 699 (1984). The prosecutor's duty to impartially pursue justice is not measured by the number of convictions obtained. *Reed*, 102 Wn.2d at 147.

We do not reverse a conviction due to prosecutorial misconduct unless the prosecutor (1) acted improperly; and (2) prejudiced the defendant's right to a fair trial. *Boehning*, 127 Wn. App. at 518. When evaluating purportedly improper remarks, we consider them in the context of the entire case, including the entire argument, the issues presented, the evidence at issue, and the court's instructions. *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). There is reversible prejudice only when there is a substantial likelihood that the conduct in question affected the jury's decision. *State v. Stenson*, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997).

The defendant bears the burden of proof. *Stenson*, 132 Wn.2d at 718. And if the defense failed to object to the claimed misconduct at trial, the error is waived "unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been" remedied by a curative instruction. *Russell*, 125 Wn.2d at 86. The rationale for this rule is to prevent appeal by ambush, to put the prosecutor on notice of the claimed misconduct, and, most importantly, to allow the trial court an opportunity to cure any error during the trial itself.

Hibberd's lawyer objected to the claimed misconduct and at least once sought a curative

instruction. The trial court overruled the objections and refused to give a curative instruction. It is therefore likely that, in the one or two instances raised on appeal for which there was no objection during trial, the trial court would have overruled the objection and refused a curative instruction.

Hibberd's first claim, that the State committed misconduct when it referred to him as a "child molester," is without merit. Even if Hibberd had timely and specifically objected to this characterization, the comment was made during closing argument in a case that charged Hibberd with child molestation. The State was endeavoring to persuade the jury that Hibberd was, in fact, a child molester. The remark was neither improper nor prejudicial. But Hibberd's remaining claims are more troubling.

Previous Washington cases address claims that a prosecutor's arguments infringe on the defendant's constitutional right to counsel. *See Reed*, 102 Wn.2d at 143, 145-46 (improper for prosecutor to urge jury not to be swayed by defendant's "city lawyers"); *State v. Negete*, 72 Wn. App. 62, 66-67, 863 P.2d 137 (1993) (improper for prosecutor to argue that defendant is paying his lawyer to twist the words of the witnesses). As early as 1918, our Supreme Court recognized that when the judge disparages defense counsel in front of the jury, it deprives the defendant of his constitutional right to counsel:

Persons accused of crime have the right to be represented by counsel whose

> usefulness shall not be impaired by any unfavorable remark or critical attitude on the part of the trial judge in the presence of the jurors, who are quick to observe and apt to receive hostile impressions, which deprive them of that fair and unbiased mental attitude which every juror should at all times possess in order to do justice between the state and the defendant at the bar. When a trial judge discredits counsel for the defense in a criminal case, he, to a certain extent, discredits the defense, and thus deprives a defendant of a constitutional right. As was said in *State v. Phillips*, 59 Wash. 252, 109 Pac. 1047:
>
> > "The aid of counsel is guaranteed by the constitution to every person accused of crime, and this is universally recognized as one of the surest safeguards against injustice and oppression. Any conduct or statement on the part of the court that tends to impair the influence or destroy the usefulness of counsel is palpable and manifest error."

State v. Moneymaker, 100 Wash. 463, 464, 171 P. 253 (1918).

In addition, federal courts have recognized that prosecutorial comments regarding the defendant's exercise of his right to counsel can be just as improper as prosecutorial comments regarding the defendant's exercise of his right to remain silent. *E.g., United States v. McDonald*, 620 F.2d 559, 561-64 (5th Cir. 1980); *see United States v. Friedman*, 909 F.2d 705, 709 (2d Cir. 1990); *Bruno v. Rushen*, 721 F.2d 1193, 1194-95 (9th Cir. 1983). These cases and others note the important and legitimate role of defense counsel in a criminal trial and strongly condemn prosecutorial attacks suggesting that seeking a lawyer equates with guilt or that defense lawyers routinely dissemble.

The State characterizes the prosecutor's remarks about Hibberd's use of his lawyer as

mere argument regarding Hibberd's demeanor and manner while testifying. Argument about the demeanor and manner of a defendant who chooses to testify is legitimate. *State v. Knapp*, 14 Wn. App. 101, 111, 540 P.2d 898, (1975); *see State v. Copeland*, 130 Wn.2d 244, 290-91, 922 P.2d 1304 (1996); *State v. Millante*, 80 Wn. App. 237, 250-51, 908 P.2d 374 (1995).

Here, however, the State did not merely argue that Hibberd appeared uncertain or looked around the courtroom while testifying. Instead, the State urged the jury to note that he looked at and sought assistance from his lawyer. Had the State merely made this observation, we might yet be persuaded that the prosecutor simply made a poor choice of words in arguing Hibberd's demeanor.

But the State coupled its observations with this explanation of the criminal justice system:

> [I]f a person . . . [is] facing being convicted of two counts of child molestation, they're going to gauge their answers, *they're going to have a person like [defense lawyer] helping them get their story out in a calm and collected manner, but you put a little pressure on that person and they're going to get flustered, and when they get flustered, the truth comes out*. [4]

RP at 149 (emphasis added).

[4] The State argues (and Hibberd appears to concede) that Hibberd did not object to this argument. We disagree. Hibberd lodged an objection and sought a curative instruction after the very next sentence, in which the State argued that Hibberd looked at (sought assistance from) his lawyer when the prosecutor forced him to tell the truth. Hibberd's argument in support of his objection makes clear that he was objecting to the entire argument, not merely the immediately preceding sentence.

The State's argument implies that: (1) people who are afraid of being convicted (guilty people) hire lawyers; (2) these people hire lawyers in order to concoct and/or present a false story at trial; but (3) prosecutorial pressure will overcome the falsely presented story; causing (4) the guilty person to look at his lawyer whenever the prosecutor forces him to abandon the lawyer's story to instead tell the truth.

The legitimacy of our criminal justice system depends on its adversarial nature and on the presumption of innocence. *Bruno*, 721 F.2d at 1194-95. The State's argument here undermines both. Unless a defendant is represented by a strong advocate[5] who challenges the State's evidence, a resulting conviction is suspect, especially in light of the respect a jury has for a public prosecutor and for law enforcement authorities. *See, e.g., State v. Dolan*, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003). Thus, not only to protect individual rights, but to safeguard the legitimacy of criminal convictions, our constitution guarantees all accused persons the right to representation by a lawyer. The State's argument improperly commented on Hibberd's exercise of the guaranteed right to counsel.[6]

---

[5] "[E]ven the most innocent individuals do well to retain counsel." *Bruno v. Rushen*, 721 F.2d 1193, 1194 (9th Cir. 1983).

[6] "It is impermissible to attempt to prove a defendant's guilt by pointing ominously to the fact that he has sought the assistance of counsel." *United States v. McDonald*, 620 F.2d 559, 564 (5th Cir. 1980).

The State also twice argued to the jury that M.C. made statements to Thurman that were consistent with her trial testimony; that Hibberd had failed to show that these out-of-court statements were inconsistent with M.C.'s testimony; and that the jury should thus find M.C. credible.

Our recent decision in *Boehning* is controlling and demonstrates that the State's argument was improper for two reasons: (1) it argued inadmissible and non-admitted evidence;[7] and (2) it shifted the burden of production to Hibberd (M.C. was credible unless Hibberd proved otherwise). *See Boehning*, 127 Wn. App. at 522-23. Hibberd's counsel unsuccessfully objected

[7] On appeal, the State appears to argue that it was permitted to argue inferences from Thurman's investigation, including her interview of M.C., since Thurman decided to arrest Hibberd at the conclusion of the investigation. That an investigating officer believed he or she possessed probable cause to arrest the defendant, believed the defendant guilty, or believed the complaining witness, is neither relevant nor admissible. Such testimony or argument invades the province of the jury. *State v. Barr*, 123 Wn. App. 373, 381-83, 98 P.3d 518 (2004), *review denied*, 154 Wn.2d 1009 (2005); *State v. Dolan*, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003); *State v. Madison*, 53 Wn. App. 754, 760, 770 P.2d 622 (1989).

to one of these improper arguments but not the other. *Boehning* held such arguments to be such flagrant misconduct as to justify reversal even when the defendant completely fails to object. 127 Wn. App. at 518, 521-23.

But improper prosecutorial arguments result in reversal only if there is a substantial likelihood that the improper arguments affected the jury's decision. We agree that the misconduct in this case is not as egregious or as extensive as in the federal cases cited above or as in *Boehning*. But the misconduct here resulted in a substantial likelihood that the jury's verdict was affected. Its impact at trial is shown in part by the effort Hibberd's lawyer exerted to convince the jury that Hibberd's guilt should not be based on his having legal counsel or on his ability to disprove the State's evidence.

Here, the evidence was very close and turned entirely on whether the jury believed M.C. or Hibberd. Both sides relied on circumstantial evidence to corroborate their testimony. The State reasonably relied on M.C.'s demeanor when she spoke to her father. Hibberd countered with M.C.'s initial failure to leave his house or alert her sisters; her continuing to help him on the computer after the first alleged molestation; and the State's failure to call the sisters as witnesses. The State's improper arguments weakened Hibberd's credibility and bolstered M.C.'s credibility. Given the evidence, we cannot say that the jury would have rendered the same verdict without the

prosecutor's misconduct[8] and thus we reverse Hibberd's conviction and remand for a new trial.

We address Hibberd's remaining issues because they may arise on retrial.

B. E-mails

Hibberd objected to the admission of testimony about two e-mail messages on hearsay grounds. He objected to the admission of exhibit one, a copy of a different e-mail message, claiming hearsay and lack of foundation. On appeal, Hibberd continues to argue that the e-mail evidence was inadmissible hearsay, but also raises issues of authentication.

We review the trial court's admission of evidence for abuse of discretion. *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). We will find an abuse of discretion only when the trial court's evidentiary decision is "manifestly unreasonable or based on untenable grounds." *State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999). We must presume the trial court's decision correct and reverse only if the appellant makes "an affirmative showing of error." *Wade*, 138 Wn.2d at 464.

[8] Moreover, making the required examination of the challenged arguments within the context of the State's entire argument does not benefit the State. Although not objected to at trial or raised on appeal, some of the State's remaining arguments arguably expressed personal opinion, urged conviction based on sympathy for M.C., or urged conviction to send a message to Hibberd and the alleged victim. *See, e.g., State v. Reed*, 102 Wn.2d 140, 145-47, 684 P.2d 699 (1984) (opinion, sympathy); *State v. Thach*, 126 Wn. App. 297, 317, 106 P.3d 782, *review denied*, 155 Wn.2d 1005 (2005) (sympathy by asking jury to put themselves in victim's place); *State v. Powell*, 62 Wn. App. 914, 918-19, 816 P.2d 86 (1991) (message).

The e-mail messages were not hearsay. ER 801(d)(2)(i) provides that statements of a party offered by the party's opponent are exempted from the hearsay rule. If, as M.C. testified, Hibberd sent the e-mails, then the statements were not hearsay, but simply the equivalent of oral, written, or telephonic statements of the defendant offered by the State in a criminal trial. The fact that the medium used to convey the statements was a computer network rather than a telephone line or the U.S. mails does not convert the statement to hearsay. E-mail messages purport to be direct statements of the sender; this makes them different than computer print-outs of data compiled by other persons or by software programs and offered to establish some fact at issue. *See, e.g., State v. Davis*, 141 Wn.2d 798, 854, 10 P.3d 977 (2000); *State v. Kane*, 23 Wn. App. 107, 111-12, 594 P.2d 1357 (1979) (both analyzing admissibility of such documents).

Furthermore, the State did not seek admission to prove the truth of the matters asserted in the emails. *See* ER 801(c). The State did not seek to prove the truth of the message stating "we are here" or that Hibberd's gratitude for M.C.'s help on his computer was genuine; instead it sought to prove that Hibberd contacted M.C. to facilitate his molestation of her. The State sought to admit each e-mail message as a verbal act, "relevant simply because it was made." *See* 5B Karl B. Tegland, Washington Practice: Evidence, Law and Practice, § 801.10, at 297 (4th ed. 1999). Such a statement is admissible. *State v. Miller*, 35 Wn. App. 567, 569, 668 P.2d 606

(1983).

Thus, the real issues regarding the e-mail messages were their authentication under ER 901 or relevance under ER 401. The State presented some authentication testimony, such as M.C.'s testimony about why she believed Hibberd sent the first e-mail and the testimony that the contents of the later e-mails referenced M.C.'s helping Hibberd. *See* ER 901(b)(4). More importantly, however, Hibberd failed to object to the admission of the e-mail testimony on this basis; by failing to contest authenticity, he prevented the trial court from making a complete record on this issue.

"An objection which does not specify the particular ground upon which it is based is insufficient to preserve the question for appellate review." *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). Hibberd did not preserve authentication or relevance objections to the admissibility of the e-mail messages M.C. testified to but did not produce. Hibberd did object to the admission of exhibit one on the basis of both hearsay and "foundation." Assuming this objection to be sufficiently specific, Hibberd has not designated exhibit one as part of the appellate record and we have no means of reviewing the trial court's ruling. As the party seeking review, Hibberd bears the burden of perfecting the record to provide us with all the relevant evidence. RAP 9.1(a), 9.6(a), (b)(3); *State v. Vazquez*, 66 Wn. App. 573, 583, 832 P.2d 883 (1992). His

failure to do so prevents review.

C. Invited Jury Instruction Error

Hibberd argues that the trial court's "to convict" instructions constituted a comment on the evidence and relieved the State of its burden of proving the element of "sexual contact." But Hibberd invited the claimed error.[9] The strictly applied rule of invited error prohibits a party from assigning error on appeal when that party has acted affirmatively in some way to set up the claimed error. *In re Pers. Restraint of Thompson*, 141 Wn.2d 712, 723-724, 10 P.3d 380 (2000); *State v. Studd*, 137 Wn.2d 533, 546-547, 973 P.2d 1049 (1999); *State v. Smith*, 122 Wn. App. 294, 299, 93 P.3d 206 (2004), *rev. granted on other grounds*, 153 Wn.2d 1017 (2005). While merely failing to object does not invite the error, Hibberd did more than fail to object. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004); *State v. Corn*, 95 Wn. App. 41, 56, 975 P.2d 520 (1999). Hibberd specifically endorsed the portions of the instructions now complained of, reading into the record those precise portions. Although the record is far from clear, it also appears that Hibberd may have invited error by participating in the process that led to the revised instructions. *See Smith*, 122 Wn. App. at 299. In any event, Hibberd's explicit agreement to the instructions certainly led the trial court to use them; he invited the error, if any, and we are precluded from reviewing it. We trust that on remand and during the retrial, any error in jury

[9] See footnote 3.

instructions will be remedied.

We reverse and remand for a new trial.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Hunt, J.

Quinn-Brintnall, C.J.